

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF NEW YORK

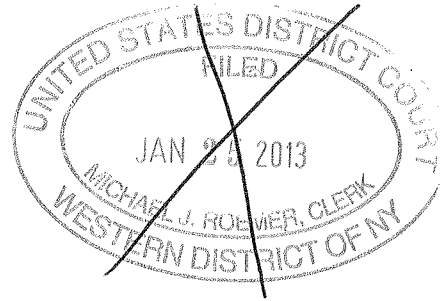
DAVID DALE,

Petitioner,

-v-

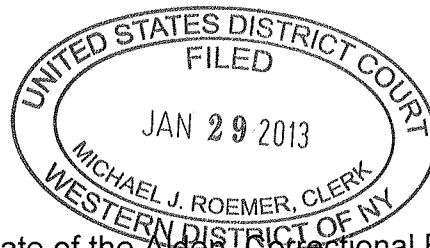
TIMOTHY HOWARD, Sheriff Erie Co.,

Respondent.



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DECISION AND ORDER
12-CV-1258Sc



Petitioner David Dale, acting *pro se*, an inmate of the Aiden Correctional Facility, seeks relief pursuant to 28 U.S.C. § 2254, alleging that his conviction in Supreme, Erie County, State of New York, was unconstitutionally obtained and that he was denied both the right to proceed *pro se* in state court on his request for a stay of execution of his sentence and release, and a stay and release, as set forth more precisely in the petition. Petitioner has paid the \$5.00 filing fee.

The Court notes that petitioner alleges in the petition that he has exhausted or attempted to exhaust the claims raised in the petition (Docket No. 1, Petition, ¶¶ 15-17, 23.) See 28 U.S.C. § 2254(b)(1); see, e.g., *Ramirez v. Att'y Gen. of N.Y.*, 280 F.3d 87, 94 (2d Cir.2001) ("State remedies are deemed exhausted when a petitioner has: (i) presented the federal constitutional claim asserted in the petition to the highest state court (after preserving it as required by state law in lower courts) and (ii) informed that court (and lower courts) about both the factual and legal bases for the federal claim."). The Court directs respondent in his response to the petition to address specifically whether petitioner has exhausted his state court remedies as required by 28 U.S.C. § 2254(b)(1).

Accordingly, IT HEREBY IS ORDERED as follows:

1. Petitioner's request for appointment of counsel is denied without prejudice as premature.

2. Respondent shall file and serve an **answer** to the petition, in accordance with Rules 4 and 5 of the Rules Governing Section 2254 Cases in the United States District Courts, no later than **March 8, 2013**. Further, the answer shall state whether a trial or any pre-trial or post-trial evidentiary proceeding was conducted. If any such proceeding was conducted, under the authority of Rule 4, the Court hereby directs respondent to provide to the Court the transcript of the proceeding, together with any record(s) of, and documents relating to, such proceeding, and such documents will be filed in the official record of this case.

Respondent also shall file and serve by the above date a **memorandum of law** addressing each of the issues raised in the petition and including citations of relevant supporting authority.

Within thirty (30) days of the date this order is served upon the custodian of the records, the Clerk of Court or any other official having custody of the records of the proceedings in Supreme Court at issue now before this Court shall submit such records to respondent or the respondent's duly authorized representative.

If petitioner appealed from the judgment of conviction or from an adverse judgment or order in a post-conviction proceeding, under the authority of Rule 4, the Court hereby directs respondent to provide to the Court a copy of the briefs and record on appeal

and the opinions of the appellate courts, if any, and such documents will be filed in the official record of this case.

Petitioner shall have thirty (30) days upon receipt of the answer to file a written response to the answer and memorandum of law.

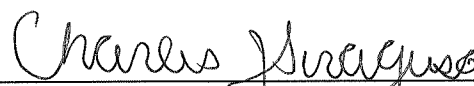
Within thirty (30) days of the date this order is filed with the Clerk of Court, respondent may file a motion for a more definite statement or a motion to dismiss the petition, accompanied by appropriate exhibits which demonstrate that an answer to the petition is unnecessary. The timely filing of such motion shall extend the time for filing an answer for fourteen (14) days, but the failure of the Court to act upon the motion within that time shall not further extend the time for filing an answer.

3. The Clerk of Court shall serve a copy of the petition, together with a copy of this order upon respondent Superintendent of Alden Correctional Facility and upon the Office of the Attorney General, Federal Habeas Unit, 120 Broadway, 12th Floor, New York, New York 10271-0332. To advise appropriate Erie County officials of the pendency of this proceeding, the Clerk of Court shall also mail a copy of this order to the District Attorney of Erie County.

PETITIONER MUST FORWARD A COPY OF ALL FUTURE PAPERS AND CORRESPONDENCE TO THE ATTORNEY APPEARING FOR RESPONDENT.

SO ORDERED.

Dated: JAN. 24, 2013
Rochester, New York



CHARLES J. SIRAGUSA
United States District Judge